Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-2055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARVIN E. CARROLL, JR.

Petitioner,

v.

THE CITY OF HUNTSVILLE,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. Whether Mr. Carroll Fails to follow the U.S. Supreme Court Rules for Certiorari? 2

II. Whether Federal Constitutional Issues were properly raised in the lower courts? 3

III. Whether the U.S. Supreme Court should consider questions not disclosed on the record? 4

IV. Whether Mr. Carroll was tried under an ex post facto law? 5

INDEX

	Page
TABLE OF AUTHORITIES	iii
QUESTIONS FOR REVIEW	i
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
ARGUMENT	
I. Mr. Carroll fails to follow the U.S. Supreme Court Rules for Certiorari.	2
II. The Federal Constitutional issues were not properly raised in the lower courts. Thus, they cannot be valid issues in this proceeding.	3
III. The U.S. Supreme Court should not consider questions not disclosed on the record.	4
IV. Mr. Carroll was not tried under an ex post facto law.	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	Page
Alderhold v City of Anniston, 99 Ala. 521, 12 So. 472	9
Arzumanian v City of Birmingham, 165 Ala. 374, 51 So. 645	9
Bouie v City of Columbia, 84 S. Ct. 1697, 378 U.S. 347, 12 L. Ed 894 (1964)	5, 6
Borok v City of Birmingham, 67 So. 389 (Ala. 1914)	8
Brooks v City of Birmingham, 67 So. 389 (Ala. 1914)	8
Brooke v State, 155 Ala. 78, 46 So. 491	8
Calder v Bull, (1978) 2 U.S. 386, 1 L. Ed 648 (Opinion of Paterson J.)	6
Chaney v City of Birmingham, 21 So. 2d 268 (Ala. Crim. App. 1944)	8, 9
Clark v Town of Uniontown, 58 So. 725 (Ala. Ct. App. 1912)	8, 9
Ex Parte City of Dothan, 501 So. 2d 1136 (1986)	7, 9
Ex Parte Dison, 469 So. 2d 662 (1984)	7, 9
Frank v Mangum, 237 U.S. 309, 59 L. Ed 969; 35 S. Ct. 582	6, 7
Fuller v Oregon, 94 S. Ct. 2116; 2126; 417 U.S. 40 (1974)	3
G. D. Searle & Co. v Cohn, 102 S. Ct. 1137, 455 U.S. 404, 71 L. ed 250 (1982)	4
Hanson v Denckla, 78 S. Ct. 1228, 1234; 357 U.S. 235 (1958)	3
Howard v City of Bessemer, 114 So. 2d 158 (Ala. Ct. App. 1959)	8
Marks v United States, (1977) 430 U.S. 188, 51 L. Ed 2d 260; 97 S. Ct. 490	6, 7

Table of Authorities Continued

	Page
Mayor of City of Birmingham v O'Hearn, 149 Ala. 307, 42 So. 836, 13 Am Cas. 1131	8
McKinstry v City of Tuscaloosa, 172 Ala. 307, 54 So. 629	9
Michigan Nat. Bank v Robertson, 83 S. Ct. 914, 372 U.S. 591, 9 L. Ed 961 (1963)	4
Neely v Martin Eby, 875 Ct. 1072, 386 U.S. 317, 18 L. Ed 2d 75, reh denied 87 S. Ct. 1366, 386 U.S. 1027, 18 L. Ed 2d 471	5
Rendeau v Mosinee Paper Corp., 95 S. Ct. 2069, 422 U.S. 49, 45 L. Ed 12 (1975)	4
Robinson v City of Sylacanga 72 So. 2d 125, (Ala. Ct. App. 1954)	8
Ross v Oregon, (1913) 227 U.S. 150	6
Sherrod v State, 197 Ala. 286, 72 So. 540	8
Sunray Mid-Continent Oil Co. v Federal Power Commission, 80 S. Ct. 392, 364 U.S. 137, 4 L. Ed 2d 1623 (1960), reh. denied 81 S. Ct. 32, 364 U.S. 856, 5 L. Ed 2d 80	4
Tennessee v Dunlap, 96 S. Ct. 2099, 426 U.S. 312, 48 L.Ed 660 (1976)	4
Turner v Town of Lineville, 56 So. 603 (Ala. Cr. App. 1911)	8
Williams v City of Birmingham, 133 So. 2d 713 (Ala. Ct. App. 1961)	8
Wilson v Cook, 66 S. Ct. 663, 327 U.S. 474 (1946)	3
Winberger v Ross, 102 S. Ct. 1510, 457 U.S. 25, 71 L. Ed 2d 715 (1982)	4
Wisconsin v Federal Power Commission, 83 S. Ct. 1266, 373 U.S. 294, 10 L. Ed 2d 357 (1963) reh denied 84 S. Ct. 25, 375 U.S. 870, 11 L. Ed 2d 99	4, 5

Table of Authorities Continued

	Page
Wofford Oil Co. v City of Russelville, 20 Ala. App. 14, 100 So. 304	9
Worthington v City of Jasper, 197 Ala. 589, 73 So. 116	9
United States Constitution Article I, Section 10	6, 7
RULES:	
U.S. Supreme Ct. Rules Sec 21.1(h)	2
STATUTES:	
28 U.S.C. Section 1257(3)	1
OTHER AUTHORITIES:	
FRUMER and WAXNER, Bender's Federal Practice Forms, Form No. 5419, p. 108	4
Annotation, 53 L. Ed 2d 1146	6
16 Am. Jur.2d, Constitutional Law, Sec. 638, p. 590	6
43 C.J. 459	8

OPINION BELOW

The Opinion below by the Petitioner is adequate for the purposes of Respondent's Brief.

JURISDICTION

Petitioner filed his Petition for Writ of Certiorari within the 60 days mandated by the rule. Jurisdiction is invoked under 28 U.S.C., Section 1257(3). The City denies that jurisdiction was properly invoked and insists that the Petition must be dismissed for lack of jurisdiction. *See* argument *infra.*

STATEMENT OF THE CASE

In his brief the Petitioner, Mr. Carroll, makes *no* reference to facts that would support the contention that a federal or constitutional issue was raised in the lower courts. The sections of Mr. Carroll's brief dealing with the "OPINION BELOW", the "JURISDICTION" and the "STATEMENT OF THE CASE" do *not* mention *rulings* by an Alabama Court that are in conflict with the U.S. Constitution. Mr. Carroll's failure to raise these issues or to show rulings contrary to the U.S. Constitution in lower courts leaves his appeal subject to attack by a Motion to Dismiss. Since Petitioner failed to meet the prerequisites for a successful appeal, his Petition should be dismissed by this Court. The record is void of facts to support a Petition of Certiorari.

Except for the above stated paragraph Respondent does not take issue with Petitioner's Statement of the case.

SUMMARY OF ARGUMENT

Mr. Carroll did not make objections based upon Federal Constitutional issues in the lower court proceedings. Since the record is void of such issues, this Honorable Court is without jurisdiction to hear Federal questions. In addition, Mr. Carroll was tried under the law of the State of Alabama. The judicial decisions cited by Mr. Carroll do not constitute an ex post facto law. There was no judicial enlargement of an Alabama statute.

ARGUMENT

Comes now the Respondent, the City of Huntsville, Alabama, who does hereby request that this Honorable Court refuse to grant a Petition for a Writ of Certiorari for the following reasons:

I. Mr. Carroll fails to follow the U.S. Supreme Court Rules for Certiorari

The Petition for a Writ of Certiorari is due to be dismissed because the appeal is not within the U.S. Supreme Court's jurisdiction and because the Petitioner, Mr. Carroll, fails to follow the U.S. Supreme Court Rules for Certiorari.

U.S. Supreme Court jurisdiction should be denied because the present Petition is not made in conformity with the rules of the United States Supreme Court. Supreme Court Rule 21.1(h) states:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions

> sought to be reviewed were raised; the method of manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." United States Supreme Court Rule 21.1(h).

The Petition in the present case fails to satisfy this rule by showing where, in the proceedings below, the federal questions and constitutional issues sought to be reviewed were raised. Consequently the Court lacks jurisdiction for this petition from the judgment of the Alabama Supreme Court. *Wilson v Cook*, 66 S Ct 663; 327 U.S. 474 (1946); *Hanson v Denckla*, 78 S. Ct 1228, 1234; 357 U.S. 235 (1958); *Fuller v Oregon*, 94 S. Ct. 2116, 2126; 417 U.S. 40 (1974).

II. Petitioner fails to mention any objections or exceptions that were raised in lower courts as a result of federal questions.

Petitioner's "Statement of the Case" does not mention any objections based on Federal grounds. No Constitutional provisions were mentioned in the trial of the case in Madison County Circuit Court, (the first Court of Record) or in the Alabama Court of Criminal Appeals, or in the Alabama Supreme Court. Thus, no Constitutional issues were raised in Alabama Courts. It is too late to raise these questions for the first

time in a Petition for A Writ of Certiorari in the United States Supreme Court. *See* cases *infra*.

Nowhere was the validity of the State Court decisions "drawn in question as to be repugnant to the Constitution, treaties or laws of the United States. Consequently, nowhere in the State Court's opinion were any of these [decisions] decided valid as opposed to arguments that they were repugnant to the Federal Constitution, treaties or laws." FRUMER and WAXNER, Bender's Federal Practice Forms, Form No. 5419, p. 108.

III. In the present case the U.S. Supreme Court should not consider questions not raised or disclosed by the record or which were not considered by the courts below.

Mr. Carroll failed to raise the issues in the case at bar during the lower court proceedings. Such issues were not a part of the record below. The necessity of preserving issues in the lower courts is a rule of law so accepted that it almost needs no citation to authorities to support is validity. Respondent will cite only the most recent cases: *Michigan Nat. Bank v. Robertson,* 83 S. Ct. 914, 372 U.S. 591, 9 L. Ed 961 (1963); Sunray Mid-Continent Oil Co. v. Federal Power Commission, 80 S. Ct. 392, 364 U.S. 137, 4 L. Ed 2d 1623 (1960), *reh. denied* 81 S. Ct. 32, 364 U.S. 856, 5 L. Ed 2d 80; *G. D. Searle & Co. v. Cohn,* 102 S. Ct. 1137, 455 U.S. 404, 71 L. Ed 2d 250 (1982); *Tennessee v. Dunlap,* 96 S. Ct. 2099, 426 U.S. 312, 48 L. Ed 660 (1976); *Winberger v. Ross,* 102 S. Ct. 1510, 457 U.S. 25, 71 L.Ed 2d 715 (1982); *U.S. v. Ortiz,* 95 S. Ct. 2585, 427 U.S. 891, 45 L. Ed 2d 623 (1975); *Rendeau v. Mosinee Paper Corp.,* 95 S. Ct. 2069, 422 U.S. 49, 45 L. Ed 12 (1975); *Wisconsin*

v. Federal Power Commission, 83 S. Ct. 1266, 373 U.S. 294, 10 L. Ed 2d 357 (1963), *reh denied* 84 S. Ct. 25, 375 U.S. 870, 11 L. Ed 2d 99; *Neely v. Martin Eby,* 875 Ct. 1072, 386 U.S. 317, 18 L. Ed 2d 75, *reh denied* 87 S. Ct. 1366, 386 U.S. 1027, 18 L. Ed 2d 471.

IV. Mr. Carroll was not tried under an ex post facto law.

The case relied upon by the Petitioner, *Bouie v City of Columbia,* 84 S. Ct. 1697, 378 U.S. 347 *12 L Ed 2d 894 (1964)* does not apply to the present case. The facts and principles of law are different. *Bouie, supra,* was basically a civil rights case involving an alleged trespass in a restaurant. In *Bouie, supra,* the South Carolina Supreme Court construed a trespass statute to "cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." *Bouie, supra,* at 1701. Thus, a substantive law was enlarged through judicial decision.

In the present case, the DUI statutes are not enlarged. The DUI statute is the same before and after the *Dison* decision. Mr. Carroll's rights were not affected by an enlargement of a previously enacted statute.

In *Bouie, supra,* the Court noted that a criminal statute must give fair warning of the conduct that it makes a crime. In the present case, the DUI statute remains the same. It is not changed by a decision of the Alabama Supreme Court. The Alabama Supreme Court did not construe the Alabama DUI laws to apply retroactively to Mr. Carroll as the Court did in

the *Bouie* case. *See Bouie, supra,* at 1703. *Bouie* presented the rare case of a judicial change in a statute which operates ex post facto. The case at bar does not present ex post facto legislation.

Since the *Bouie* case does not apply to the present fact situation, other cases must be considered to find the law in the present case. "It is a settled principle, recognized at least by implication in virtually every [Court] decision . . . that the United States Constitution's ban on ex post facto laws applies strictly to legislative acts and does not extend to changes in the law effected by judicial decisions. *Calder v Bull,* (1978) 3 U.S. 386, 1 L Ed 648 (opinion of Paterson J.); *Ross v Oregon,* (1913) 227 U.S. 150, 57 L Ed 458, 33 S.Ct. 220; *Frank v Mangum,* (1915) 237 U.S. 309, 59 L Ed 969, 35 S.Ct 582; *Marks v United States,* (1977) 430 U.S. 188, 51 L Ed 2d 260, 97 S.CT. 990." *Annotation* 53 L Ed 2d 1146; 16A Am Jur 2d Constitutional Law Sec. 638 P. 590.

> "Thus, in Ross v Oregon (1913) 227 US 150, 57 L Ed 458, 33 S Ct 220, the court observed that Article I, sec 10 of the United States Constitution, according to the natural import of its terms, is a restraint upon legislative power, and concerns the making of laws rather than their construction by the courts. The Court went on to say that while the provision is directed against legislative rather than judicial acts, it reaches every form in which the legislative power of a state can be exerted, whether it is a constitution, a constitutional amendment, an enactment of the legislature, a bylaw or ordinance of a municipal corporation, or a regulation or or-

> der of some other instrumentality of the state exercising delegated legislative authority.
>
> Similarly, it was declared in Frank v Mangum (1915) 237 US 309, 59 L Ed 969, 35 S Ct 582, that the constitutional prohibition of Article I, sec. 10, of the United States Constitution, that no state shall pass any ex post facto law is, as its terms indicate, directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.
>
> And in Marks v United States (1977) 430 US 188, 51 L Ed 2d 260, 97 S Ct 990, the court noted that the ex post facto provision contained in Article I, Section 9, clause 3, of the Constitution, is a limitation upon the powers of the legislature, and does not of its own force apply to the judicial branch of government." Annotation, 53 L Ed 2d 1146.

The settled Alabama law at the time of Mr. Carroll's arrest for driving under the influence was contrary to the decision in *Ex Parte Dison*, 469 So. 2d 662 (1984). The law finally applied to petitioner's case was the law in effect at the time of his offense. That law was enunciated in *Ex Parte City of Dothan*, 501 So 2d 1136 (1986) which overruled *Dison* to return to the established law in the State of Alabama.

Mr. Carroll argues that because of *Dison* he should be permitted to object to an unsworn complaint. *Dison* was an anomaly. The consensus of Alabama case law has always been that an unsworn complaint is void in a prosecution under a *municipal* ordinance only if an objection was made in municipal court. A

failure to raise the issue bars a party from objecting to an unsworn complaint on appeal. *Howard v City of Bessemer*, 114 So. 2d 158, (Ala. Ct. App. 1957); *Brooks v City of Birmingham*, 20 So. 2d 115 (Ala. Ct. App. 114); *Williams v City of Birmingham*, 133 So. 2d 713, (Ala. Ct. App. 1961); *Robinson v City of Sylacauga*, 72 So. 2d 125, (Ala. Ct. App. 1954); *Chaney v City of Birmingham*, 21 So. 2d 268 (Ala. Ct. App. 1944); *Turner v Town of Lineville*, 56 So. 603 (Ala. Ct. App. 1911); *Borok v City of Birmingham*, 67 So. 389 (Ala. 1914); *Clark v Town of Uniontown*, 58 So. 725 (Ala. Ct. App. 1912).

In the case at bar, no timely objection was interposed, so the petitioner cannot now complain of a lack of a sworn affidavit before the recorder. The reasoning and authorities in the *Chaney, supra*, case merit recital in the present case:

> "While one on trial in a Recorder's Court for the violation of a municipal ordinance is entitled to be apprised of the nature and cause of the prosecution against him by written complaint *(Mayor, etc of City of Birmingham v O'Hearn*, 149 Ala. 307, 42 So. 629), that an accused was arrested and tried in such court without a written complaint (affidavit) *does not render the judgment there entered void for want of jurisdiction. Brooke v State*, 155 Ala. 78, 46 So. 491; *Sherrod v State*, 197 Ala. 286, 72 So. 540. (Emphasis Supplied) Thus for the reason that he may waive the right. 43 C.J. 459.
>
> If the defendant proceed to trial in such court without demanding such complaint, he

> is held to have waived the right and, later on appeal, he cannot for the first time avail of it. *Alderhold v City of Anniston*, 99 Ala. 521, 12 So. 472; *McKinstry* case, supra; *Clark v City of Uniontown*, 4 Ala. App. 264, 55 So. 725; *Wofford Oil Co v City of Russelville*, 20 Ala. App. 14, 100 So. 304; *Worthington v City of Jasper*, 197 Ala. 589, 73 So. 116; *Arzumanian v City of Birmingham*, 165 Ala. 374, 51 So. 645." *Chaney, supra* at 272-273.

The above cited cases prove that the decision in *Dison*, supra, under established Alabama law, was incorrect. *Dison*, supra, was a new interpretation of the law. Established Alabama law was in accord with *Ex Parte City of Dothan, supra*, and Mr. Carroll's case was decided under such law. Mr. Carroll was not, as he alleges, tried under a "new interpretation of the law." To claim that *Ex Parte City of Dothan* imposed an ex post facto law is pure sophistry. *Ex Parte City of Dothan* restated the correct Alabama law on the necessity of an objection to the lack of a sworn complaint in Municipal Court.

CONCLUSION

This Petition for a Writ of Certiorari should be dismissed for numerous reasons. First, Mr. Carroll fails to follow the U.S. Supreme Court rules for Certiorari. Second, the Federal Constitutional issues were not properly raised in the lower court. In addition the U.S. Supreme Court should not consider questions not disclosed on the record. Finally, Mr. Carroll was not tried under an ex post facto law because there was no judicial enlargement of a statute.

For these reasons Respondent, the City of Huntsville, Alabama, does hereby request that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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